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No. 94-1721

In The

Supreme Court of the United States

October Term, 1994

TOWN OF SMITHTOWN and JAMES DOWLING,

Petitioners,

vs.

ROBERT WALZ, LANA SUE WALZ and ROBERT WALZ, JR.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Second Circuit correctly held that respondents stated a claim for violation of their rights to substantive due process under 42 U.S.C. § 1983 based upon a deprivation of water supply service to their home by the refusal of a town official to issue an excavation permit for a public street, where issuance of such permit was conditioned upon respondents conveying a portion of their property to the town for no consideration.

2. Whether the Second Circuit correctly held that petitioner James Dowling was not entitled to qualified immunity for refusing to perform a ministerial task based on a clearly improper motive.

3. Whether the Second Circuit correctly held that the damages awarded to respondents were neither unauthorized nor excessive.

4. Whether the Second Circuit correctly held that the award of attorney's fees to respondents was reasonable in all respects.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations iii

Counter Statement of the Case 1

Reasons for Denying the Writ 6

I. The Second Circuit's holding that respondents stated a claim based on a substantive due process violation was correct and not in conflict with prior Supreme Court precedent. 6

II. The Second Circuit correctly held that petitioner James Dowling was not entitled to qualified immunity. 11

III. The Second Circuit correctly held that the damages awarded to respondents were neither unauthorized nor excessive. 13

IV. The Second Circuit correctly held that the award of attorney's fees was reasonable in all respects. ... 15

Conclusion 17

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Albright v. Oliver, 114 S. Ct. 807 (1994) 9

Board of Regents v. Roth, 408 U.S. 564 (1972) 6, 10

Brady v. Town of Colchester, 863 F.2d 205 (2d Cir. 1988) . 7

Collins v. City of Harker Heights, 503 U.S. 115 (1992) ... 8, 9

Davis v. Scherer, 468 U.S. 183 12

DeBlasio v. Zoning Bd. of Adjustment for the Township of West Amwell, No. 93-5301, 1995 U.S. App. LEXIS 9820 (3rd Cir., May 1, 1995) 8

DeShaney v. Winnebago County Dep't of Soc. Serv., 489 U.S. 189 (1989) 9

Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) 9, 11

Farrar v. Hobby, 113 S. Ct. 566 (1992) 13, 14, 16

Gagliardi v. Village of Pawling, 18 F.3d 188 (2d Cir. 1994) 6

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 11, 12

Hensley v. Eckerhart, 461 U.S. 424 (1983) 5, 15, 16

Contents

Page

Kelly Kare, Ltd. v. O'Rourke, 930 F.2d 170 (2d Cir.), *cert. denied*, 502 U.S. 907 (1991) 6, 7

McKinney v. Pate, 20 F.3d 1550 (11th Cir.), *cert. denied*, 115 S. Ct. 898 (1995) 8

Miner v. City of Glens Falls, 999 F.2d 655 (2d Cir. 1993) . 14

Pearson v. City of Grand Blanc, 961 F.2d 1211 (6th Cir. 1992) 8

Ragin v. Harry Macklowe Real Estate Co., 6 F.3d 898 (2d Cir. 1993) 14

RRI Realty Corp. v. Incorporated Village of Southhampton, 870 F.2d 911 (2d Cir.), *cert. denied*, 493 U.S. 893 (1989) 6, 7, 9

Sullivan v Town of Salem, 805 F.2d 81 (2d Cir. 1986) 7

Sylvia Dev. Corp. v. Calvert County, 48 F.3d 810 (4th Cir. 1995) 8

Walz v. Town of Smithtown, et al., 46 F.3d 162 (2d Cir. 1995) .....*passim*

Yale Auto Parts, Inc. v. Johnson, 758 F.2d 54 (2d Cir. 1985) 7

Ying Jing Gan v. City of New York, 996 F.2d 522 (2d Cir. 1993) 12

Contents

Page

Statutes Cited:

42 U.S.C. § 1983 ..... i, 1, 4

42 U.S.C. § 1988 .....4, 15, 16

United States Constitution Cited:

Fifth Amendment 9

Other Authority Cited:

Smithtown News, Vol. 51, No. 7, May 11, 1995 at 21 15

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Robert Walz, Lana Sue Walz and Robert Walz, Jr. respectfully request that this Court deny the petition for writ of certiorari which seeks review of the Second Circuit's opinion below. That opinion is reported at 46 F.3d 162 (2d Cir. 1995) and is reproduced in the petition for writ of certiorari at Appendix A.

COUNTER STATEMENT OF THE CASE

Respondents Robert Walz, Lana Sue Walz and Robert Walz, Jr. ("respondents" collectively) brought this action under 42 U.S.C. § 1983 against petitioners the Town of Smithtown, New

York and its Superintendent of Highways, James Dowling, based upon a denial of public water service caused by Dowling's refusal to issue a permit allowing the county Water Authority to excavate a public street in order to connect respondents' home to the public water system. The complaint alleged, and the jury following trial specifically found, that petitioner Dowling's refusal to issue the requisite permit was intended to coerce respondents to convey a portion of their land to the Town of Smithtown.

Respondents own a home in Smithtown, New York which was serviced by well water until the early winter of 1991-1992, when the well went dry. In early January of 1992, respondents applied to the Suffolk County Water Authority for public water service. Since they were without any water service, respondents expeditiously complied with the Water Authority's requirements, which included digging a trench on the property and paying a fee of $1,100. The only prerequisite remaining prior to connecting respondents to public water service was an excavation permit to be issued by the petitioner Town of Smithtown.[1]

Given the fact that respondents were without water service (and therefore heat) during the winter, the Water Authority made an emergency application for the excavation permit by telephoning the Town of Smithtown Highway Department.[2] Upon receiving the call, a clerk at the Highway Department prepared a permit which indicated on its face that it was for "EMERGENCY Water Service", and stated that verbal approval was issued that same day. On the following day, petitioner Dowling initially signed the permit, and thereafter voided the

1. The relevant portion of the Smithtown Code which directs, among other things, that the Superintendent of Highways "shall" issue a permit is reproduced in the decision below at 46 F.3d at 168.

2. Such a procedure is utilized by the Water Authority and the town to expedite water service to homeowners in similar situations.

permit. The Water Authority was then made aware that the permit was void, despite the fact that petitioner Dowling knew that respondents were without water and heat.

After voiding the emergency permit, petitioner Dowling telephoned respondent Lana Sue Walz and inquired as to whether respondents would deed 2,250 square feet of their property to Smithtown in order to widen the road. At that time, petitioner informed respondents that they would not receive water service until the land was conveyed to the Town. The Water Authority was unable to assist respondents in this regard.

Within two hours after Dowling's telephone call to the respondents, a Highway Department employee brought a deed prepared by Dowling seeking to convey the property sought by Dowling. However, respondents informed Dowling that they would not donate land in order to obtain water service. The following day, Dowling left for a month-long vacation, with knowledge of respondents' predicament. Only after returning from his vacation did Dowling seek assistance of the Town Attorney in order to obtain the property he sought from respondents.

Thereafter, respondents sought relief by way of a state court proceeding to compel the issuance of an excavation permit. Prior to that, Dowling issued a permit which included a list of unprecedented special requirements which, the evidence at trial demonstrated, had never before been imposed upon such a permit for a similar purpose.[3] The state court determined that one of the

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3. Among the special requirements indicated on the permit was the posting of a $3,678 cash bond. As the Second Circuit observed, "[t]he typical excavation permit contains no such conditions." 46 F.3d at 165. In fact, at trial petitioner Dowling was unable to identify a permit with similar conditions out of the hundreds which had been issued for a period of three years prior to the trial.

requirements was in fact unreasonable, and therefore directed Dowling to issue a permit consistent with its order. Although Dowling did issue a subsequent permit, respondents were of the opinion that the latter permit was inconsistent with the state court order, and therefore filed a motion to hold Dowling in contempt. Three days prior to the hearing on the motion for contempt, Dowling issued a permit which imposed only the standard $35 fee and excluded the special conditions he had earlier sought to impose. Thereafter, approximately three and one-half months after they sought to receive water, respondents were connected to the public water supply.

Respondents later filed this action in federal district court, pursuant to 42 U.S.C. § 1983, and alleged that Dowling's actions were violative of Respondents' rights to substantive due process under the Fourteenth Amendment. Following a jury trial, the finders of fact answered a series of special interrogatories in finding for the respondents. *See* 46 F.3d at 166. Specifically, with respect to the relevant time periods, the jury concluded that petitioner Dowling rescinded the initial permit, and placed unreasonable burdens on the subsequent permits, for the explicit and improper purpose of depriving respondents of a water supply as a means to compel the respondents to convey a portion of their land to the Town for no consideration.

The jury awarded compensatory damages against the Town and Dowling in the amount of $102,000 and punitive damages against Dowling in the amount of $9,500. Thereafter, the district court awarded $48,276 to respondents as attorney's fees pursuant to 42 U.S.C. § 1988.

Following the entry of judgment, petitioners appealed to the Second Circuit on various grounds. In affirming the judgment in its entirety, the Second Circuit rejected petitioners' arguments that: (1) respondents had no constitutionally protected property

interest; (2) assuming a property interest, respondents were only entitled to procedural, rather than substantive, due process protection; (3) petitioner Dowling was immune from damages based on qualified immunity; (4) that the award of damages was improper; and (5) that the award of attorney's fees was improper.

After application of the Second Circuit's entitlement test to the question of whether respondents were afforded substantive due process protection, the court below determined that respondents had a property right to the excavation permit and that substantive due process protected respondents from being "compelled to convey some of their land in order to obtain utility service." 46 F.3d at 169. The court below additionally held that Dowling, as a matter of law, was not entitled to qualified immunity. *Id.* ("Regardless of any doubts as to whether his conduct violated due process, Dowling could not have believed, as a matter of equal protection or simply of the laws of the town, that he had discretion to deny an excavation permit to the Walzes as a means of extorting land from them").

The court below likewise rejected petitioners' claims that the damage award was improper and excessive. With respect to the award of attorney's fees, the Second Circuit reviewed the record, mindful of *Hensley v. Eckerhart,* 461 U.S. 424 (1983), and determined that the award of attorney's fees was reasonable, "both in terms of the hourly rate and the number of hours expended on the litigation." 46 F.3d at 170. With specific regard to petitioners' assertion that the district court erred in deciding the attorney's fees without an evidentiary hearing, the court below, citing *Hensley,* noted that "awards of comparable size are routinely made without an evidentiary hearing," *id.*, and rejected petitioners' argument. Petitioners' motion for rehearing was subsequently denied by the court below.

REASONS FOR DENYING THE WRIT

I.

THE SECOND CIRCUIT'S HOLDING THAT RESPONDENTS STATED A CLAIM BASED ON A SUBSTANTIVE DUE PROCESS VIOLATION WAS CORRECT AND NOT IN CONFLICT WITH PRIOR SUPREME COURT PRECEDENT.

Petitioners' position that there is "no such thing as a substantive due process protected 'property right' " is in conflict with well-established Second Circuit precedent and represents a question which this Court has appropriately declined to review in the past. *See RRI Realty Corp. v. Incorporated Village of Southhampton*, 870 F.2d 911 (2d Cir.), *cert. denied*, 493 U.S. 893 (1989). In light of the factual record presented in this case, and more particularly the specific findings made by the jury after trial, the Second Circuit's well-reasoned rejection of each of petitioners' claims on appeal offers no compelling basis for this Court to grant the petition. In addition, insofar as this case is concerned, petitioners' assertions regarding the "far-reaching" nature of the Second Circuit's decision and an alleged conflict between the circuits are seriously misplaced.

The Second Circuit's approach to the respondents' claims was premised upon the "well-developed property interest analysis," *Walz v. Town of Smithtown, et al.*, 46 F.3d 162 (2d Cir. 1995), which itself stems from this Court's reasoning in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). In that connection, the Second Circuit has consistently applied the "clear entitlement" test to questions of protected property interests in the area of land regulation and zoning. *See Walz*, 46 F.3d at 169; *Gagliardi v. Village of Pawling*, 18 F.3d 188 (2d Cir. 1994); *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170 (2d Cir.), *cert. denied*, 502 U.S. 907

(1991); *RRI Realty*, 870 F.2d 911 (2d Cir.), *cert. denied*, 493 U.S. 893 (1989); *Brady v. Town of Colchester*, 863 F.2d 205 (2d Cir. 1988); *Sullivan v. Town of Salem*, 805 F.2d 81 (2d Cir. 1986); *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54 (2d Cir. 1985).

In examining the claims brought by respondents, and in accord with the authority cited above, the Second Circuit determined that petitioner Dowling possessed "no discretion [to] void the permit, or to refuse to issue another permit." 46 F.3d at 168.[4] Despite petitioners' claim that the Second Circuit misread the local Code in question, the language of the Town Code speaks for itself and clearly mandates that, upon compliance, a permit shall be issued. 46 F.3d at 168. Thus, petitioners' claim that the various requirements which the Code imposes upon such applications implies a degree of discretion to the issuing authority is incorrect and of no moment in this case, given the jury's findings and the fact that respondents' applications were in compliance. In short, although petitioner Dowling may have been permitted to impose certain reasonable restrictions, he clearly had no authority to deny the permits outright and deprive respondents of water service.

To the extent that petitioners may be heard to argue that the Second Circuit's holding is at odds with the law of other circuits, it must be pointed out that even were some articulable need for guidance from this Court regarding the jurisprudence of substantive due process, this case is clearly not the proper vehicle for such a review. In short, given the record in this case, and despite differences in the applicable standards, the facts

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4. It is worthy of emphasis to repeat that, aside from the lack of discretion in the applicable Code, the jury specifically determined that petitioner Dowling's motive for voiding and denying the permits was to improperly compel the respondents to deed a portion of their property to the municipality for no consideration.

underlying respondents' substantive due process claim would surely state a cause of action in the circuits. *See DeBlasio v. Zoning Bd. of Adjustment for the Township of West Amwell,* No. 93-5301, 1995 U.S. App. LEXIS 9820 (3rd Cir. May 1, 1995) (holding that "in the context of land use regulation . . . a land-owning plaintiff states a substantive due process claim where he or she alleges that the [municipality's] decision . . . was arbitrarily or irrationally reached"); *Sylvia Dev. Corp. v. Calvert County,* 48 F.3d 810 (4th Cir. 1995) (applying protected property interest analysis to claim of substantive due process violation in zoning context); *Pearson v. City of Grand Blanc,* 961 F.2d 1211 (6th Cir. 1992) (holding with respect to substantive due process claim that plaintiff must show that "there is no rational basis for an administrative decision").

Petitioners rely upon the Eleventh Circuit decision in *McKinney v. Pate,* 20 F.3d 1550 (11th Cir. 1994), *cert. denied,* 115 S. Ct. 898 (1995), in support of the general proposition that substantive due process protection should not be extended to new areas, which is not the case herein in any event. However, *McKinney* involved a case of public employment, which triggers very different concerns than does the issue of a protected property right relating to an individual's actual property. *See, e.g.,* 20 F.3d at 1560 (noting that a section 1983 suit by a terminated employee bypasses available state remedial procedures).

Moreover, the Eleventh Circuit explicitly noted its view that there are viable substantive due process rights for certain "actions that can not be countenanced." *Id.* at 1560 n. 15. In light of the findings of fact present in the record in this case, respondents submit that they would maintain a viable cause of action even in the circuits which apply the most restrictive standard to substantive due process. Therefore, while mindful of this Court's reluctance "to expand the concept of substantive due process," *Collins v. City of Harker Heights,* 503 U.S. 115, 125 (1992)

(citation omitted), the facts presented herein fit safely within the parameters of the intention of the Due Process Clause " 'to prevent government from abusing [its] power, or employing it as an instrument of oppression.' " *Id.* at 126 (*quoting DeShaney v. Winnebago County Dep't of Soc. Serv.*, 489 U.S. 189, 196 (1989) (further citation omitted). In sum, the Second Circuit's decision clearly would not be the appropriate basis upon which to launch a review of such claims.

Petitioners' apparent claim that this Court's decision in *Dolan v. City of Tigard,* 114 S. Ct. 2309 (1994), mandates a "taking" analysis with respect to claims such as respondents' also misses the mark. The plaintiff in *Dolan* brought the case under an uncompensated taking theory pursuant to the Fifth Amendment, *id.* at 2315-16, and therefore this Court had no reason to apply a substantive due process analysis. Certainly, *Dolan* cannot be read to prohibit substantive due process claims in this context. Furthermore, even if the plaintiff in *Dolan* had asserted a violation of substantive due process, the discretionary nature of the variances sought therein would not in all likelihood rise to the level of an entitlement under the Second Circuit standard which emanates from *Roth. See RRI Realty,* 870 F.2d 911 (2nd Cir.), *cert. denied,* 493 U.S. 893 (1989).

Petitioners' reliance upon *Albright v. Oliver,* 114 S. Ct. 807 (1994), in support of the proposition that substantive due process may not be relied upon in the factual scenario presented by this case is likewise suspect. In *Albright* this Court's reasoning focused on the fact that the plaintiff therein, a criminal defendant, could have based his claims on specific protections afforded him by the Bill of Rights. In that regard, the majority did not rule out the application of substantive due process to deprivations of property interests. Indeed, Justice Scalia's concurrence appears to underscore the Court's focus on the states' criminal processes. 114 S. Ct. at 814 (Scalia, J., concurring).

Furthermore, to the extent that petitioners may be heard to argue that the Second Circuit's *Roth*-based entitlement analysis is called into question by *Albright,* or that substantive due process cannot protect state-created property rights, either argument is unavailing in light of the Second Circuit's decision. The court below specifically noted that "even if what is at stake is the Walzes' property interest *in their land,* that analysis would not . . . alter the outcome in the instant matter. As landowners, the Walzes surely had a right not to be compelled to convey some of their land in order to obtain utility service." 46 F.3d at 169 (emphasis added).

Both as a matter of law, as well as with respect to the factual findings of the jury, the opinion of the Second Circuit below was well-reasoned and well within Supreme Court and Second Circuit precedent. Petitioners' assertion that the decision below is of "far-reaching" effect is somewhat disingenuous given the fact that it was petitioner Dowling's extraordinary actions which gave rise to respondents' cause of action. Certainly, the jury's finding that petitioner Dowling intentionally withheld the necessary permit, with the knowledge that the respondents were without water, for the explicit purpose of compelling the respondents to deed over land to the Town strongly undercuts petitioners' insistence that the case will have an overly broad impact.[5]

In addition, petitioners' assertion that "this case is analogous

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5. Petitioners' argument that Dowling's conduct did not qualify as arbitrary, and that the question of his intent was unclear, is completely without merit. There was never any suggestion that Dowling's behavior was merely negligent. Moreover, petitioners' suggestion that Dowling's motive was proper or intended to serve the public interest is striking. Perhaps the most efficient response to petitioners' argument in this regard was given by the court below, which recognized that Dowling's conduct amounted to attempted extortion. 46 F.3d at 169.

to the situation where one property owner exacts a concession from another in exchange for the grant of an easement benefiting the other property owner" is particularly misleading. Brief in Support at 41. In actual fact, the Second Circuit's citation to this Court's language in *Dolan,* which suggests that the lack of a legitimate state interest in relation to a permit condition results in an " 'out-and-out plan of extortion' " is the more accurate assessment of the case. *Walz,* 46 F.3d at 169 (citing *Dolan,* 114 U.S. at 2317).

It also must be noted that petitioners' implicit suggestion that the Second Circuit misinterpreted the facts of the case is completely without merit. One need look no further than the jury's answers to the special interrogatories, 46 F.3d at 166, in order to ascertain that the respondents' claims were fully supported by the factual findings, as well as amounting to a substantive due process violation under the guiding precedents of the Second Circuit and this Court.

Finally, petitioners' reference to a finding by the district court that respondents possessed a protected property right to a water supply was in no way a basis for the Second Circuit's decision. Rather, the court below explicitly stated that addressing that issue was unnecessary, and therefore it played no part in the court's reasoning.

II.

THE SECOND CIRCUIT CORRECTLY HELD THAT PETITIONER JAMES DOWLING WAS NOT ENTITLED TO QUALIFIED IMMUNITY.

In *Harlow v. Fitzgerald,* 457 U.S. 800, 816 (1982), this Court reasoned that "[i]mmunity generally is available only to officials performing discretionary functions. In contrast with the thought

processes accompanying 'ministerial' tasks, the judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values and emotions." *See also, Ying Jing Gan v. City of New York*, 996 F.2d 522, 531 (2d Cir. 1993) (citing *Harlow*, 457 U.S. at 818 (1982)). Over a decade later, this Court had an opportunity to expand upon the "ministerial duty exception" to the doctrine of qualified immunity. In *Davis v. Scherer*, 468 U.S. 183, 196 n. 14, this Court noted its view that an official's breach of duty "would forfeit official immunity only if that breach gave rise to [a plaintiff's] cause of action for damages."

The court below correctly applied the ministerial duty exception to petitioner Dowling's assertion of qualified immunity. Despite petitioners' hollow attempt to demonstrate that the relevant Code afforded Dowling considerable discretion, the record speaks for itself. The Code states that, upon compliance with the identified requirements, an excavation permit "shall be issued in the name of the Superintendent of Highways of the Town of Smithtown." 46 F.3d at 168. As a factual matter, the Code does not give the Superintendent the discretion to impose unreasonable requirements or refuse to issue a permit for any period of time. Petitioners imply that the requirements which may be imposed amount to discretionary authority to withhold a permit, or void an already issued permit, both of which Dowling did. However, petitioners' argument sorely misses the mark. As the Code makes clear, and as the Second Circuit ruled, Dowling was completely without such discretion.[6]

It is likewise clear that the decision of the court below in no

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6. In point of fact, petitioners' argument collapses of its own weight when viewed against the actual facts. To the extent petitioners argue that Dowling had the authority to impose various special conditions, it must be remembered that he *issued* the original permit with no special conditions, and then voided it without articulating the need for any special conditions.

way infringes or alters this Court's precedents concerning qualified immunity. The conduct of petitioner Dowling was extraordinary, and the factual, objective circumstances surrounding his duty fully support the Second Circuit's view that "Dowling could not have believed, as a matter of equal protection or simply of the laws of the town, that he had discretion to deny an excavation permit to the Walzes as a means of extorting land from them." *Id.* at 169.

In sum, petitioners' argument regarding the proper rejection of the defense of qualified immunity by the court below is without merit and bespeaks no need whatever for review by this Court.

III.

THE SECOND CIRCUIT CORRECTLY HELD THAT THE DAMAGES AWARDED TO RESPONDENTS WERE NEITHER UNAUTHORIZED NOR EXCESSIVE.

Petitioners argue that the damages awarded to respondents "cannot be reconciled with this Court's . . . teachings . . . ." Brief in Support at 54. However, the Second Circuit's rejection of petitioners' attack on the award of damages represents neither an extension nor a deviation from this Court's precedents. In addition, petitioners' assertion that respondents offered no proof of "physical injury or suffering" completely misses the point. As this Court noted in *Farrar v. Hobby*, 113 S. Ct. 566 (1992), " 'the basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights' " (citation omitted). Respondents submit that the goal articulated by this Court in *Farrar* was achieved by the jury at trial.

As the court below found, respondents did present evidence

of emotional distress to the jury, which testimony the jury was certainly authorized to credit. Furthermore, substantial testimony was offered detailing the distress and discomfort suffered by respondents as a result of being without water for approximately three and one-half months. The Second Circuit's determination that the compensatory damage award should be affirmed was appropriate based on *Farrar* and well-reasoned Second Circuit precedent. *See Miner v. City of Glens Falls*, 999 F.2d 655, 662 (2d Cir. 1993); *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 907 (2d Cir. 1993).

Petitioners additionally argue that the jury's determination of damages was "irrational". Without citing any persuasive authority, petitioners suggest that the award of approximately $1,000 per day was insupportable. Notwithstanding petitioners' assertion that "all that was proved was inconvenience," the Second Circuit pointed out that the damages awarded to respondents *included* compensation for "the inconvenience and hardship suffered by the Walzes because their home lacked running water." 46 F.3d at 170. The court below further noted that it had previously upheld larger awards for mental distress based on a constitutional tort, *id.*, and that the punitive damages award of $9,500 was not excessive.

In light of petitioners' failure to identify any contrary authority, and in view of the fact that the Second Circuit's precedents regarding damages are consistent with the guidelines supplied by this Court, petitioners' request for review of these issues should be denied.

IV.

THE SECOND CIRCUIT CORRECTLY HELD THAT THE AWARD OF ATTORNEY'S FEES WAS REASONABLE IN ALL RESPECTS.

In accord with their argument to the court below, petitioners challenge the district court's award of attorney's fees, pursuant to 42 U.S.C. § 1988, in the amount of $48,276. Although petitioners do not dispute that respondents qualify as prevailing parties under section 1988, it is nevertheless asserted that the application for attorney's fees was inadequate. However, despite petitioners' baseless insistence that the lower courts' holdings made a "mockery of all that this Court has said" with respect to fee applications, and despite petitioners' offensive allegation that counsel was "at the least, unethical,"[7] it is clear that the decisions of both the district court and the Second Circuit were fully supported by the applicable law and facts.

In compliance with this Court's holding in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), the district court applied the familiar lodestar approach to the fee application. After reviewing the relevant factors, the district court determined that an hourly rate of $200 was appropriate. The Second Circuit affirmed that determination. The district court also reviewed the time records

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7. It was similarly argued to the court below that counsel's conduct was "unethical" with respect to the application for attorney's fees. As indicated above, the Second Circuit found the fee awarded to be reasonable both in terms of hours expended as well as the hourly rate applied. Petitioners' reiteration of the charge of unethical conduct to this Court, apparently based on the general amount of the award, leads respondents to point out that up to the filing of the instant petition, counsel for the petitioners had been paid $90,000 in fees. *Smithtown News*, Vol. 51, No. 7, May 11, 1995 at 21. When viewed in that context, petitioners' protestation regarding the alleged "simple, straightforward" nature of the case is somewhat disingenuous.

submitted by counsel, and after excluding hours attributable to work done in connection with the Water Authority (against which respondents did not prevail), the district court calculated the fee and made a further reduction. In the course of its decision, the district court referred to, but did not individually consider, the twelve factors bearing on reasonableness. *See Farrar*, 113 S. Ct. at 575 (noting that a court need not recite the twelve factors bearing on reasonableness) (citing *Hensley*, 461 U.S. at 430 n.3). Clearly, the district court's determination of the fee award was properly undisturbed by the Second Circuit.

As to petitioners' argument that they were entitled to a hearing on this matter, the Second Circuit's rejection of that position was completely proper in light of this Court's admonition in *Hensley* that "[a] request for attorney's fees should not result in a second major litigation." 461 U.S. at 437. Even accepting that there could be an application for attorney's fees under section 1988 which triggered a right to a full blown hearing, as the Second Circuit found, petitioners offered no substance in support of their claim that a hearing was required. 46 F.3d at 170. Thus, petitioners' insinuation that the court below "misread" *Hensley* as not requiring a "fair opportunity" to contest attorney's fee applications misses the mark. The court below simply held that, given counsel's application and the district court's treatment of it, a hearing was unnecessary in this case.

In the light of these circumstances, petitioners' argument that the Second Circuit erred in relation to its affirmance of the attorney's fee award is without merit.

CONCLUSION

For the foregoing reasons, respondents submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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